

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1110

To be argued by
MICHAEL HARTMERE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1110

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN M. WEBB,

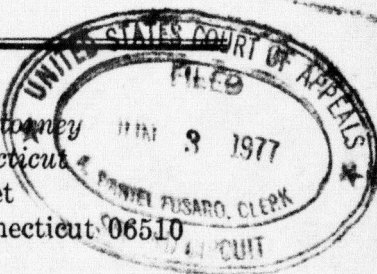
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

PETER C. DORSEY
United States Attorney
District of Connecticut
270 Orange Street
New Haven, Connecticut 06510

MICHAEL HARTMERE
Assistant United States Attorney



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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1110

UNITED STATES OF AMERICA,

Appellee.

—v.—

JOHN M. WEBB,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On October 28, 1976, a Federal Grand Jury returned a true bill of indictment (N-76-134) charging the defendant with violations of Title 18, United States Code, Sections 2113(a), 2113(b) and 2113(d), in three counts. The three counts charged that the defendant had robbed a Federally insured bank in Norwalk, Connecticut on October 13, 1976. Prior to his indictment, the defendant had been arrested in Los Angeles, California on a warrant and complaint issued by the United States Magistrate, New Haven, Connecticut charging bank robbery.

On November 9, 1976, the defendant entered a plea of not guilty to each count of the indictment.

On January 18, 1977, a jury was empanelled and sworn before the Honorable Robert C. Zampano, United

States District Judge. On January 25, 1977, the Government commenced presenting evidence to the jury. The jury trial concluded on January 28, 1977; and, after approximately five hours of deliberations, the jury returned a verdict of guilty on Counts One and Two and not guilty on Count Three. On February 28, 1977, the defendant was sentenced to the custody of the Attorney General or his authorized representative for a term of twelve years. Subsequently, a timely Notice of Appeal was filed.

Statutes Involved

Title 18, United States Code, Section 2113. Bank robbery and incidental crimes:

"(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

"Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

"Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or

money or any other thing of value exceeding \$100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than 5,000 or imprisoned not more than ten years, or both; . . .

"(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."

Questions Presented

I. Did the trial court properly deny the defendant's motion to strike the testimony of the Government's expert?

II. Did the Government present evidence upon which a reasonable mind might fairly conclude that at the time of the offense the defendant had the substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law?

Statement of Facts

On October 13, 1976, at approximately 12:45 p.m., an individual approached the head teller at the Union Trust Company, 700 Connecticut Avenue, Norwalk, Connecticut. The individual, wearing a large wig and sunglasses, asked the head teller for change for a one dollar bill. (Tr. 9, 10).^{*} The individual then unbuttoned his coat and pulled

^{*} References marked "(Tr.)" refer to the transcript of proceedings in the trial court.

a gun from his belt, announcing a holdup. (Tr. 10). The robber stated, "I don't want to hurt you, but I will if I have to", or "I don't want to shoot you, but I will if I have to", and warned the teller not to press an alarm. (Tr. 10, 11). The robber then handed the head teller a dark trash bag demanded her money and the money of the other tellers which the head teller placed into the bag. Some of the money given to the robber by each of the three tellers was marked money, the serial numbers of which were recorded and retained by the bank. (Tr. 11, 14, 29). The head teller and two other bank employees positively identified the defendant, John M. Webb, as the individual who robbed the Union Trust Company, Norwalk, on October 13, 1976. (Tr. 18, 30, 38).

An audit conducted at the bank on October 13, 1976 disclosed a shortage of \$6,269.94. (Tr. 6). The Union Trust Company was insured by the Federal Deposit Insurance Corporation at the time of the robbery. (Tr. 7).

Approximately six days after the robbery, the defendant admitted to his brother that he had robbed the bank. (Tr. 48). Thereafter, the defendant asked his brother to hide the remainder of the proceeds of the robbery, approximately \$5,000.00. (Tr. 49). One week from the date of the robbery, the defendant, having fled from Connecticut, telephoned his brother to ask that the remainder of the money be wired to California. (Tr. 49, 50). The defendant's brother went to the police, told them what had transpired, and subsequently led police to the locations where the money and the wig used in the robbery were hidden. (Tr. 50-53). At trial, the defendant stipulated that one hundred twenty-three five-dollar bills, totalling \$615.00, which constituted a portion of the marked money given by bank employees to the

robber, were among the \$5,000.00 recovered by the police with the assistance of the defendant's brother. (Tr. 82-83).

The defendant was interviewed by Detective Joseph Russo, Norwalk Police Department, and Special Agent William A. Allen, Jr., Federal Bureau of Investigation, on October 19, 1976, six days after the robbery. (Tr. 84). The defendant denied owning either a gun or a wig and stated that he had been attending to his automobile brokerage business on the day of the robbery. (Tr. 86, 87). Special Agent Allen and Detective Russo showed the defendant a bank photograph of the robber and asked the defendant about various items of clothing depicted in the photograph. (Tr. 88). Special Agent Allen noticed that the shoes worn by the defendant at the time of the interview were "remarkably similar" to those worn by the robber, saw a pair of sunglasses in the trunk of defendant's car, and at the defendant's apartment found and seized a shirt, pair of pants and belt similar to those depicted in the bank photograph and a black plastic trash bag. (Tr. 88-92). During the interview, the defendant stated that he had never been inside the Union Trust Company, Norwalk. (Tr. 87). However, at trial the defendant stipulated that his fingerprint had been found on the rear door of the bank on October 13, 1976. (Tr. 77-78). The defendant told Special Agent Allen and Detective Russo that he had some business transactions to conduct and the interview was terminated with the defendant stating that he would appear at the police station on the following day for further interview. (Tr. 93, 94). Immediately after this interview, however, the defendant fled to California. (Tr. 113).

The defendant was arrested in Hollywood, California, by agents of the Federal Bureau of Investigation while he was attempting to pick up money being wired to him by

his brother. (Tr. 112-114). The defendant was interviewed in California at the time of his arrest and stated that after being shown the bank photographs by the police and F.B.I. agents he became frightened and fled from Connecticut to California. (Tr. 113). The defendant again denied participation in the robbery of the Union Trust Company on October 13, 1976. (Tr. 113).

The theory of the defense was insanity. In support of this defense, medical records and reports of three admissions to Stamford Hospital for psychiatric treatment were introduced into evidence, as well as the records of one admission to Fairfield Hills Hospital. (App. 19-37).^{*} These records showed that the defendant had been treated at first for a schizophrenic reaction and later for various types of schizophrenia. (App. 19, 21, 22, 28).

The defendant called a psychiatrist in private practice, Dr. Marc A. Rubenstein, who testified as an expert witness as to his opinion of the defendant's criminal responsibility. (Tr. 148). Dr. Rubenstein had seen the defendant on three occasions, December 1, December 8 and December 11, 1976, each session lasting approximately one hour. (Tr. 150). Almost three weeks after his last session with the defendant, Dr. Rubenstein wrote his report to the Federal Public Defender, at which time Dr. Rubenstein could not state that the defendant lacked substantial capacity, but rather "reserved judgment on the question". (Tr. 193). Although he was "troubled" by the question of the defendant's substantial capacity, he could not state at the time of writing his report that the defendant lacked substantial capacity at the time of the offense. (Tr. 193). In his report, Dr. Rubenstein stated:

^{*} References marked "(App.)" refer to the Defendant-Appellant's Appendix to his brief.

"I find myself troubled by the specific question posed by an insanity defense: did he lack 'substantial' capacity at the time of the crime? As I have indicated, there is no question that he has a very significant mental disturbance. Despite a certain level of seemingly rational calculation that went into the robbery it remains clear that to 'some' extent his thinking was very much influenced by this disturbance. Whether that extent meets what the law requires by the word 'substantial', is much more difficult to answer." (Gov't. App. 3).*

By the time of his trial testimony (January 26, 1977), Dr. Rubenstein had come to the conclusion that the defendant at the time of the offense lacked substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. (Tr. 164). However, Dr. Rubenstein also testified that the defendant did have the ability to control his mental disease and his behavior and that the defendant is "probably fairly rational most of the time". (Tr. 202, 203). Dr. Rubenstein testified that the defendant had told him during the first interview that he (the defendant) had robbed the bank because voices had told him to, but Dr. Rubenstein had indicated to the defendant that he was reluctant to accept that explanation. (Tr. 188). Thereafter, at the third interview, the defendant told Dr. Rubenstein a version of the story which was "totally devoid of any indication of disturbance whatsoever". (Tr. 189). Dr. Rubenstein stated that he felt the defendant had been "somewhat self-serving in exaggerating the hearing of voices". (Tr. 189). The defendant had tried to tell Dr. Rubenstein that he had robbed the bank because he was crazy and had heard voices, but Dr. Rubenstein

* References marked "(Gov't. App.)" refer to the appendix to the brief of the Appellee.

testified that he did not base his opinion on what the defendant had told him about the voices, "whether or not he ever heard them". (Tr. 194, 195).

In rebuttal, the Government called Dr. Robert B. Miller, a psychiatrist with over thirty-five years experience in criminal responsibility examinations and currently Superintendent of Fairfield Hills Hospital, a Connecticut state mental hospital. (Gov't. App. 4). Dr. Miller, having conducted responsibility examinations and/or testified in more than one thousand cases, examined the defendant for approximately one and one-half hours on December 29, 1976. (Gov't. App. 7). Dr. Miller diagnosed the defendant as suffering from a "minimal degree of a mixed type of schizophrenia" and an underlying personality disorder. (Gov't. App. 9, 12, 13). However, Dr. Miller testified that in his opinion the defendant did not lack substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. (Gov't. App. 14). During cross-examination, Dr. Miller testified that to him the words "know" and "appreciate" pretty much interchange and that he uses them interchangeably. (Gov't. App. 37, 39). Dr. Miller stated that while the word "appreciate" connotes something more than mere cognition, the difference is not of a magnitude "which would be significant to the determination which it was my duty to attempt to arrive at". (Gov't. App. 39).

The Government also introduced evidence which showed that on October 14, 1976, the day after the defendant robbed the Union Trust Company, the defendant opened a checking account under the name of his business, Webb Automobile Brokerage, and at the same time bought two small money orders to pay bills. (Tr. 271-274). The account was opened with an initial deposit of \$265.00.

(Tr. 273). In this regard, Special Agent Allen, Federal Bureau of Investigation, saw two receipts for expenditures made by the defendant on October 14, 1976, one a payment of an auto repair bill and the other the payment for a new watch. (Tr. 93).

Special Agent Allen and Detective Russo had previously testified that they had spent approximately three hours with the defendant on October 19, 1976, and that the defendant at that time (six days after the robbery) appeared "very calm, very collected, very directly responsive to our questions . . . very sure of himself". (Tr. 94, 109). Special Agent Bernard P. Flanigan, Federal Bureau of Investigation, who had arrested the defendant in California on October 21, 1976 and interviewed him for approximately two and one-half hours, testified that the defendant was calm, responsive, "his speech was coherent, he appeared rational". (Tr. 114).

Mr. Fernand Thibault, Senior Program Director, Y.M.C.A., Norwalk, testified that the defendant lived at the Y.M.C.A. between May and July of 1976. (Tr. 275, 276). Mr. Thibault stated that he had no problems with the defendant during that time and that "there was nothing in his—in his way of behaving that brought him to my attention as compared to some other residents". (Tr. 285). The Government called another former landlord of the defendant, Maurice Moore. Mr. Moore testified that the defendant had lived at his house from August 24, 1976 to October 18, 1976. (Tr. 287). Mr. Moore saw the defendant frequently during this two month period encompassing the time of the robbery and Mr. Moore had no problems at all with the defendant. (Tr. 288).

ARGUMENT**I.****The Trial Court Properly Denied The Defendant's Motion To Strike The Testimony Of The Government's Expert.**

Since the defendant had introduced some evidence of insanity at trial, there was no longer a presumption of sanity and the Government was required to prove the defendant's sanity beyond a reasonable doubt. *United States v. Hendrix*, 542 F.2d 879, 880 (2d Cir. 1976). To meet its burden, the Government called several rebuttal witnesses, the first of whom was Dr. Robert B. Miller, the Superintendent of Fairfield Hills Hospital, a State mental hospital in Connecticut. The defendant here contends that Dr. Miller was unable to "understand and apply this Court's insanity test". (Appellant's Brief, p. 12).

Dr. Miller, a pre-eminently psychiatrist with approximately thirty-five years experience, had conducted criminal responsibility examinations and/or testified in various Federal and State courts in over one thousand cases, approximately one-third of which were at the request of the defense.* Initially, the Government would

* Dr. Miller was graduated from Princeton University and the Loyola University College of Medicine. While in the United States Navy, he did postgraduate work in psychiatry at Bethesda Naval Hospital and St. Elizabeth's Hospital in Washington, D.C. His duties in the United States Navy included being Division Psychiatrist for the Second Marine Division and Post Psychiatrist at Parris Island. Subsequently, Dr. Miller had additional psychiatric training at Kings Park State Hospital, New York, and at the New York Psychiatric Institute. In 1948, Dr. Miller became a diplomate in the American Board of Psychiatry and Neurology.

[Footnote continued on following page]

suggest that if Dr. Miller, considering his qualifications, is unable to understand this Court's insanity test, there must be few individuals in the world qualified to do so.

This court in *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966), adopted Section 4.01 of the Model Penal Code as the standard of criminal responsibility for the Courts of this Circuit. Section 4.01 provides that: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* at 622. During direct examination, Dr. Miller testified that, after examining the

While in private practice in New York, Dr. Miller held the positions of Consulting Neurologist to Kings Park State Hospital, Associate Attending Psychiatrist at Montefiore Hospital, Director of Psychiatry at the Hospital for Joint Diseases, Consultant in Psychiatry at Memorial Hospital, Middletown, Consultant in Psychiatry to the New York Guild for the Jewish Blind and Consultant in Psychiatry to the House of the Holy Comforter. Additionally, Dr. Miller taught both undergraduate and postgraduate psychiatry at the college of Physicians and Surgeons of Columbia University.

Dr. Miller is a licensed psychiatrist in New York, New Jersey and Connecticut.

Dr. Miller came to Connecticut as Chief of Professional Services, Connecticut Valley Hospital, Middletown, Connecticut, a State mental hospital. While in that position, Dr. Miller helped form the Whiting Forensic Institute.

Dr. Miller is a fellow of the American Psychiatric Association, a fellow of the New York Academy of Medicine, and a member of the county and State Psychiatric and Medical Societies in Connecticut. Dr. Miller was liason between the bar and State Medical Society, and is currently a member of the State Medical Society's committee on legal problems.

Dr. Miller has been Superintendent of Fairfield Hills Hospital, which handles approximately 4,500 patients per year for the past eight years. (Gov't. App. 4-7).

defendant and reviewing hospital records of Fairfield Hills Hospital, which included summaries of previous hospitalizations at Stamford Hospital, it was his opinion that the defendant had substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. (Gov't. App. 8, 14).

Toward the end of cross-examination, defense counsel questioned Dr. Miller about the difference in meaning between "know" and "appreciate" and Dr. Miller's use of the word "know" in his report of January 20, 1977.* (App. 36-41). Dr. Miller testified that to him the words "know" and "appreciate" pretty much interchange and that, in fact, he uses them interchangeably. (Gov't. App. 37, 39). Dr. Miller acknowledged that to "appreciate" connotes more than mere cognition or awareness, but also stated that the difference is not of a magnitude "which would be significant to the determination which it was my duty to attempt to arrive at"; namely, an opinion as to criminal responsibility. (Gov't. App. 39).

The Government submits that the trial court properly denied the defendant's motion to strike Dr. Miller's testimony. In denying the defendant's motion, Judge Zampano stated:

"I think the defense reads much more into Doctor Miller's testimony with respect to a motion to strike, which is probably the most drastic motion that I could grant. Particularly with an expert.

* Defense attorney had been provided, prior to trial, a copy of Dr. Miller's report in which he used the word "know". If the Public Defender had a serious question concerning Dr. Miller's qualifications or ability to "understand and apply this Court's insanity test", surely it would have been presented to the Court prior to the witness' testimony, rather than on the third day of trial at the very end of the witness' testimony in the form of a motion to strike that testimony.

"Doctor Miller testified on direct, certainly right down the line, under the test. It was only under a very thorough and, in some ways, argumentative cross-examination that we started to get some distinctions between the words 'know' and 'appreciate', but certainly not enough to strike his testimony, but I would say sufficient to base some final arguments on the part of the defense.

"The motion is denied. Counsel are perfectly free, on both sides, to pick up various weaknesses, shall I say, in the expert's testimony and use them as best they can in arguing to the jury. What weight the testimony should have is for the jury, but the foundation is sufficient to allow the testimony to come in, to be considered by the jury under the instructions of law I will give them in my charge." (Tr. 267, 268).

Both sides did in fact argue the weaknesses in the respective testimony of the experts. (Tr. 200-302, 317-319). Moreover, Judge Zampano correctly charged the jury on this Circuit's insanity test, and no allegation to the contrary has been made.

The Government suggests that the defendant has attributed too much importance to a comparatively short portion of Dr. Miller's testimony. The jury had before them the conflicting opinions of two experts as to the defendant's sanity. The law is clear that the trier of fact is not bound by the opinion of an expert. *Mims v. United States*, 375 F.2d 135, 140 (5th Cir. 1967); *Gallion v. United States*, 386 F.2d 255, 257 (9th Cir. 1967). Dr. Miller had been extensively cross-examined as to his use of the word "know" and the specific meaning he attached to that word. When Dr. Miller's testimony is viewed *in toto*, it is clear that he used "know" as a

synonym for "appreciate", and that he meant more than mere cognition or simple awareness when he used it. (Gov't. App. 4-41).

In the present case as in any criminal case, the defendant's mental responsibility for the crime was not a medical but a legal question involving social and moral judgments. In *Freeman, supra*, Chief Judge Kaufman stated:

"At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical but a legal, social or moral judgment. Ideally, psychiatrists—much like experts in other fields—should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities. But once this information is disclosed, it is society as a whole, represented by judge and jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts. In so deciding, it cannot be presumed that juries will check their common sense at the courtroom door. As Professor Wechsler has rightly commented, '*It's not to be expected that juries will lightly accept the proposition that one who seemingly knew in a true sense did not know.*' One would expect the jury skepticism and the system is the healthier for that jury skepticism.'" (Emphasis supplied—citation omitted). *United States v. Freeman, supra*, at 619-620.

The value of expert testimony as to sanity lies in the explanation of the disease and its dynamics, not in the mere expression of a conclusion. *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1957). The questions of

credibility and weight of expert opinion testimony in these cases are for the trier of facts, and such testimony is ordinarily not conclusive even when uncontradicted. *United States v. Levy*, 326 F. Supp. 1285, 1297 (D. Conn.), *aff'd*, 449 F.2d 769 (2d Cir. 1971). Here, the questions of weight and credibility to be afforded Dr. Miller's testimony were properly left for the jury's determination by Judge Zampano.

Dr. Miller's use of the word "know" was a matter of semantics, in that his testimony was clear as to meaning. Certainly, the law as to criminal responsibility is complex and the role of a psychiatrist in assisting a jury deciding the issue is not an easy one. Indeed, on re-direct examination by defense counsel, Dr. Rubenstein, the defense expert, when asked whether the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct, responded: "As best I can understand that, yes." (Tr. 201).

The Government suggests that there is no magic in the word "appreciate" and that the common usage of the English language is flexible enough to accommodate the use of synonyms in most instances. Commenting upon the testimony of a psychiatrist called as a Government witness, Judge Van Graafeiland recently wrote:

"He testified that Dwyer was suffering from neither a mental disease or defect and that, on the dates of the offenses alleged, Dwyer *understood* the wrongfulness of his conduct and retained the ability to conform that conduct to the requirements of the law." (Emphasis supplied). *United States v. Dwyer*, 539 F.2d 924 (2d Cir. 1976).

In the present case, the trial court properly denied the defendant's motion to strike the testimony of the Government's expert.

II.

The Government Presented Ample Evidence Upon Which A Reasonable Mind Might Fairly Conclude That At The Time Of The Offense The Defendant Had The Substantial Capacity Both To Appreciate The Wrongfulness Of His Conduct And To Conform His Conduct To The Requirements Of Law.

In the present case, as in any criminal case, constitutional due process required the Government to put forward and prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364 (1970). The defendant contends that because of the "misleading, confusing and incompetent nature" of Dr. Miller's testimony, the Government's rebuttal evidence as to the defendant's sanity was insufficient as a matter of law. (Appellant's Brief, p. 17).

The law is clear that the Government must prove mental responsibility beyond a reasonable doubt. *United States v. Hendrix*, *supra* at 880. However, in determining whether the Government has met its burden, this Court should view all the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Hawley*, Docket No. 76-1469 (2d Cir., April 27, 1977), Slip Op. 3239 at 3243. The standard to be applied is whether a reasonable mind might have fairly concluded guilt beyond a reasonable doubt based on the evidence, including that dealing with sanity. *United States v. Hawley*, *supra* at 3243; *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). Taken together then, the issue is whether, viewing the evidence in the light most favorable to the Government, the trial court properly denied defendant's motions for judgment of acquittal because reasonable men would not

necessarily retain a reasonable doubt about the defendant's sanity at the time of the crime. *United States v. Shackelford*, 494 F.2d 67, 75 (9th Cir.), *cert. denied*, 417 U.S. 934 (1974).

The Government contends that the testimony of Dr. Miller, standing alone, was sufficient to meet the burden of proof. Dr. Miller testified that the defendant had the substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. (See Argument I, *supra*).

Moreover, much of the testimony of Dr. Rubenstein substantially bolstered the Government's case. For example, Dr. Rubenstein testified that the defendant's actions in planning and executing the robbery, disposing of the evidence, temporarily evading arrest by using an alibi, and thereafter fleeing to California, were consistent with the actions of someone who had substantial capacity to appreciate the wrongfulness of his conduct. (Tr. 187). He testified that at their third meeting the defendant had told him of a version of the story which was "totally devoid of any indication of disturbance whatsoever", and that he felt the defendant had been "somewhat self-serving in exaggerating the hearing of voices". (Tr. 189). The defendant had tried to tell Dr. Rubenstein that he had robbed the bank because he was crazy. (Tr. 194, 195). Dr. Rubenstein testified that he believed the defendant had some ability to control his mental disease, and that the defendant is "probably fairly rational most of the time". (Tr. 202, 203). Dr. Rubenstein testified that while he was not aware of all of the details concerning the planning and execution of the robbery at the time he rendered his opinion, he was "quite concerned about the fact that there was this apparent effective, logical planning that had gone on". (Tr. 183).

Some of the details of which Dr. Rubenstein had been unaware prior to cross-examination included the facts that the bank was located in front of a very large parking lot for an easy getaway and the defendant had carried a large bag into the bank for the money, the manager and assistant manager were not present at the time of the robbery, the defendant had raised his voice only once during the robbery and that was to demand all of the money, the defendant had told the police and the Federal Bureau of Investigation an alibi during his interview in Connecticut, and that the defendant also gave an alibi as to the reasons for his flight from Connecticut to the Federal Bureau of Investigation in California. (Tr. 176-182). All of the facts surrounding the robbery had been supplied to Dr. Rubenstein by the defendant with the exception of a "little bit of information" from the defense attorney. (Tr. 175).

The jury was entitled to find that the defendant had lied to Dr. Rubenstein about the hearing of voices as a motivation to rob the bank. (Tr. 188, 194, 195). Moreover, the jury was clearly entitled to reject Dr. Rubenstein's expert opinion if it found the opinion to be based on an incorrect or incomplete view of the facts. *United States v. Shackelford*, *supra* at 75; *United States v. Ingman*, 426 F.2d 973, 977 (9th Cir. 1970); *United States v. Julian*, 440 F.2d 779, 780 (9th Cir. 1971).

Additionally, the Government called numerous lay witnesses who testified about the defendant's appearance, speech and actions. Three witnesses from the bank who observed the defendant during the robbery testified that he was "very cool, very calm, and collected". (Tr. 16, 31, 38). On the day following the robbery, the defendant opened a checking account in the name of his business and purchased two money orders to pay bills. (Tr. 271-

274). On the same day, he paid an auto repair bill and purchased a new watch. (Tr. 93). The F.B.I. agent and Norwalk Police Detective who spent three hours with the defendant six days after the robbery testified that he appeared "very calm, very collected, very directly responsive to our questions . . . very sure of himself". (Tr. 94, 109). An F.B.I. agent who had spent two and one-half hours with the defendant eight days after the robbery testified that the defendant was calm, responsive, "his speech was coherent, he appeared rational". (Tr. 114). The Senior Program Director of the Y.M.C.A. where the defendant had lived between May and July of 1976 stated that he had no problems with the defendant and that "there was nothing in his—in his way of behaving that brought him to my attention as compared to some other residents". (Tr. 285). Finally, the defendant's landlord for the two-month period prior and subsequent to the time of the offense stated that he had no problems at all with the defendant. (Tr. 287, 288).

There is no question that a defendant may suffer from a relatively serious mental disorder and yet be found responsible for his crime by the trier of fact. See, for example, *United States v. Baird*, 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); *United States v. Levy*, *supra*. In this regard, the Government suggests that the lay evidence presented to the jury in the instant case, standing alone, is sufficient to sustain defendant's conviction. *Mims v. United States*, *supra* at 140; *Dusky v. United States*, 295 F.2d 743, 754 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962); *United States v. Warren*, 447 F.2d 278, 280 (2d Cir. 1971).

The Government strongly suggests that the evidence of defendant's sanity, when viewed *in toto*, was overwhelming and that the trial court properly denied the defendant's motions for judgment of acquittal.

CONCLUSION

The Government strongly urges that the trial court properly denied the defendant's motion to strike the testimony of the Government's expert and that the Government presented ample evidence upon which a reasonable mind might fairly conclude that at the time of the offense the defendant had the substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. The judgment of conviction in this case should be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut
 270 Orange Street
 New Haven, Connecticut 06510

MICHAEL HARTMERE
Assistant United States Attorney

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-1110

U S A,
Appellee

vs.

JOHN M. WEBB,
Appellant

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street,
New York, New York 10023

That on the 3rd day of June, 1977, deponent served the within Brief and Appendix
upon Andrew B. Bowman, Esq., Chief Federal Public Defender, 770 Chapel Street
New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 3rd day of June, 1977

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977

